SUPREME COURT, U. S.

In the Supreme Court of the United States

_____ TERM 1974

NO. 73-1991

CITY OF NAPLES,

Petitioners

vs.

THE PREPAKT CONCRETE COMPANY
and AMERICAN EMPLOYERS'
INSURANCE COMPANY,

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

CARL R. PENNINGTON, JR. of
the law firm of
Pennington, Wilkinson & Sauls
Post Office Box 3985
Tallahassee, Florida 32303

Attorneys for Petitioner

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented For Review	2
Applicable Federal Statutes	4
Statement of Case and Facts	8
Jurisdiction of the Court of First Instance	11
Reasons Relied on For the Allowance of the Writ	12
Conclusion	20
Certificate of Service	22
Appendix A - Opinion Below	App. 1
Appendix B - Opinion Below	App. 7
Appendix C - Stay Order	App. 11

CITATIONS

Page

Cases

Schoenamsgruber v. Hamburg American Line
294 U.S. 454 (1935)..... 14, 15

Shanferoke Coal & Supply Corp. v. Westchester Service Corp.,
293 U.S. 449 (1935)..... 13, 14

Chatham Shipping Co. v. Fertex Steamship Corp.,
352 F.2d 291 (2nd Cir. 1965)..... 16

City of Naples v. Prepakt Concrete Company,
490 F.2d (5th Cir. 1974)..... 1

City of Naples v. Prepakt Concrete Co.,
Unreported (5th Cir. 1974)..... 1

Farr & Co. v. CIA Intercontinental De Navegacion,
243 F.2d 342 (2nd Cir. 1957)..... 16

Hetherington & Berner, Inc. v. Melvin Pine & Co.,
256 F.2d 103 (2nd Cir. 1958)..... 20

Merchant v. Meade-Morrison Mfg. Co.,
29 F.2d 40 (2nd Cir. 1928)..... 19

New England Power Co. v. Asiatic Petroleum Corp.,
456 F.2d 183 (1st Cir. 1972)..... 13

Statutes

9 U.S.C. 14

9 U.S.C. Section 3 ..... 4, 17

9 U.S.C. Section 4 ..... 4, 5, 15, 16 17, 18

9 U.S.C. Section 9 ..... 6, 7, 18

9 U.S.C. Section 10 ..... 7, 8

28 U.S.C. Section 128 ..... 14, 15

28 U.S.C. Section 129 15
28 U.S.C. Section 225 ..... 14, 15
28 U.S.C. Section 227 15
28 U.S.C. Section 1254(1) 2
28 U.S.C. Section 1291 ..... 8, 13
28 U.S.C. Section 1332 12
28 U.S.C. Section 1441 12

Rules

Rules of Supreme Court 23(g) 11

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM 1974

NO._____

CITY OF NAPLES,

Petitioner,

vs.

THE PREPAKT CONCRETE COMPANY and AMERICAN EMPLOYERS' INSURANCE COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

The Petitioner, CITY OF NAPLES, prays that the Supreme Court of the United States issue its Writ of Certiorari to review the hereinafter-described opinions and judgments of the United States Court of Appeals, Fifth Circuit.

OPINIONS BELOW

The initial opinion of the United States Court of Appeals, Fifth Circuit, is reported in City of Naples v. Prepakt Concrete Company, et al., 490 F. 2d 182 (5th Cir. 1974). The opinion of the Court on rehearing was rendered through opinion dated May 23, 1974. A copy of each of said opinions is appended hereto.

JURISDICTION

The United States Court of Appeals, Fifth Circuit, entered its opinion herein on February 22, 1974, and based upon a timely Petition for Rehearing rendered an opinion on rehearing dated May 23, 1974. Said Order on Rehearing denied the Petition for Rehearing filed herein by Petitioner. No order granting an extension of time within which to file this Petition for Writ of Certiorari has been sought or obtained. The said Court of Appeals entered an order on June 10, 1974 staying the issuance of the mandate. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

The Petitioner, CITY OF NAPLES, on May 26, 1970, filed an action at law in the Circuit Court of the Twentieth Judicial Circuit in and for Collier County, Florida against Respondent, THE PREPAKT CONCRETE COMPANY, (the Contractor) and Respondent, AMERICAN EMPLOYERS' INSURANCE COMPANY, (the Surety). On May 28, 1970, the Contractor and Surety filed a Petition for Removal to the District Court of the Southern District of Florida, Miami Division, together with its removal bond. On June 29, 1970, the Contractor and Surety filed a pleading entitled "Notice of Hearing and Motion for Stay of Arbitration", which motion prayed for the entry of an order compelling arbitration and for an order staying the pending litigation. On July 14, 1970, the Petitioner filed a Motion to Remand the cause to the State Court. On July 20, 1970, the Contractor and Surety filed an additional removal bond. On September 9, 1970, the Contractor and Surety filed a "Cross-Motion to Amend Petition for Removal" requesting leave to amend its Petition for Removal. By Order dated October 21, 1970, the United States District

Court, Southern District of Florida entered an Order: (1) denying Petitioner's Motion to Remand; (2) granting the Contractor's and Surety's Cross-Motion to Amend Petition for Removal and granting ten (10) days within which said parties could file amendments; (3) granting the Contractor's motion to compel arbitration; and (4) granting the Surety's motion for stay of proceedings pending arbitration. Thereafter, on October 30, 1970, the Contractor and Surety filed an Amended Petition for Removal.

On November 20, 1970, the Petitioner filed a Renewal of Motion for Stay of Arbitration and Motion to Remand. Such Motion was denied by order of the District Court entered November 30, 1970. Arbitration proceedings were thereafter held and an arbitration award was entered. On August 15, 1972, the Petitioner filed with the Florida District Court a Motion to Vacate and Set Aside the Award of the Arbiters and to remand the cause to the State Court. Petitioner also filed a Motion requesting that the Arbitration Association be required to transfer to such Court the transcript of the arbitration proceedings for review by said Court. On September 25, 1972, the Contractor filed a Motion to Stay Petitioner's Motion to Vacate and set aside the arbitration award. By Order dated December 6, 1972, the District Court entered an Order granting the Petitioner's motion to compel the Arbitration Association to transmit the record to such Court and enjoined the parties from proceeding in any other District Court of the United States to litigate the issues involved in the controversy. The Respondents herein filed an Interlocutory Appeal from said last-mentioned Order, and it is from the Court of Appeals' Opinions relating to such Appeal that the above-described opinions arise. The questions hereby arising are:

(1) Whether the Order of the United States District Court, Southern District of Florida, entered on October 21, 1970, granting the Contractor's motion to compel arbitration

and staying the Court proceedings constituted a final judgment or order or constituted an interlocutory order;

(2) Whether the United States District Court for the Southern District of Florida has jurisdiction and venue in the pending cause or whether such jurisdiction and venue is vested in the United States District Court for the Northern District of Ohio.

APPLICABLE FEDERAL STATUTES INVOLVED

Sections 3, 4, 9 and 10 of Title 9 and Section 1291 of Title 28, United States Code, are pertinent hereto and provide as follows:

§ 3. Stay of proceedings where issue therein referable to arbitration

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order

to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an

issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for

the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration-

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to

the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

§ 1291. Final decisions of district courts.-

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF CASE AND FACTS

On May 26, 1970, the Petitioner (hereinafter referred to as the "City"), filed an action at law in the Circuit Court of the Twentieth Judicial Circuit in and for Collier County, Florida against the Respondents (hereinafter referred to as the "Contractor" and the "Surety"). Thereafter, on May 28, 1970, the Contractor filed with the American Arbitration Association a Demand for Arbitration. On June 22, 1970, the Contractor and Surety filed a Petition for Removal to the District Court of the Southern District of Florida, Miami Division, together

with its removal bond, thereby seeking to remove the proceedings pending in the Circuit Court of the Twentieth Judicial Circuit in and for Collier County, Florida to the said Federal District Court. On June 29, 1970, the Contractor and Surety filed a pleading entitled "Notice of Hearing and Motion for Stay or Arbitration", which Motion prayed for the entry of an order compelling arbitration and for an order staying the pending litigation. On July 14, 1970, the City filed a Motion to Remand the cause to the State Court. On July 20, 1970, the Contractor and Surety filed an additional removal bond. On September 9, 1970, the Contractor and Surety filed a "Cross-Motion to Amend Petition for Removal", thereby requesting leave to amend its Petition for Removal as originally filed. By Order dated October 21, 1970, the Judge of the United States District Court, Southern District of Florida, hereinafter referred to as the "Florida District Court", entered an order: (1) denying the City's Motion to Remand; (2) granting the Contractor's and Surety's motion to amend their Petition for Removal and granting ten (10) days within which said parties could file amendments; (3) granting the Contractor's motion to compel arbitration; and (4) granting the Surety's motion for stay of proceedings. The Contractor and Surety thereafter filed an Amended Petition for Removal on October 30, 1970. On November 20, 1970, the City filed a renewal of its Motion to Remand and Motion for Stay of Arbitration. Such Motion was denied by the Florida District Court by order dated November 30, 1970. The City then filed a response to the Contractor's Demand for Arbitration, and in accordance with the order of the Florida District Court, filed with the Arbitration Association its claim against the Contractor and Surety for breach of contract.

Arbitration hearings were commenced in Cleveland, Ohio over the venue objection of the City and over the City's objection to the Arbitration Association's refusal to make the Surety

a party to said proceedings. Subsequently, such arbitration proceedings were partially held within the State of Florida.

The Arbitration Association entered an award on May 17, 1972, denying the claim of the City and ruling in favor of the claim of the Contractor. On August 15, 1972, the City filed with the Florida District Court its Motion to Vacate and Set Aside Award of Arbitrators and to Remand This Cause to State Court and also filed a motion requesting that the Arbitration Association be required to transfer to such Court the transcripts of arbitration proceedings for review by this Court. On September 25, 1972, the Contractor filed a motion to stay the City's said motion to vacate and set aside the arbitration award. Previously on June 19, 1972, the Contractor filed a motion seeking confirmation of such award in the United States District Court, Northern District Court of Ohio, Eastern Division (hereinafter referred to as the "Ohio District Court"), and the City thereafter filed a Motion to Dismiss said Petition and, subject to said Motion to Dismiss, moved said Court to vacate and set aside the award of the arbiters. By order dated December 6, 1972, the Florida District Court entered an order: (1) granting the City's motion to compel the Arbitration Association to transmit the record to such Court; and (2) enjoining the parties from proceeding in any other District Court of the United States to litigate the issues involved in the controversy.

It is from this last-mentioned order of the Florida District Court that the Contractor and Surety filed their "Notice of Interlocutory Appeal", which appeal was lodged with the United States Court of Appeals, Fifth Circuit, (hereinafter referred to as "the Court of Appeals").

The Court of Appeals rendered its initial opinion on February 22, 1974 vacating the injunction issued by the Florida District Court in its order of December 6, 1972. Thereafter, the

City filed a timely Petition for Rehearing and the Court of Appeals, on rehearing, entered its second opinion, dated May 23, 1974, which opinion denied the said Petition for Rehearing. It is the two (2) opinions of the Court of Appeals which the Petitioner seeks to have reviewed by this Court.

Throughout the proceedings, the City has consistently taken the position that: (1) the proceedings below were improperly removed from the State Court to the Federal Court; (2) the Order granting a stay of the Federal Court proceedings was error; (3) the Order requiring arbitration was error; (4) under the circumstances, none of the foregoing Orders were final judgments or orders; and (5) the Florida District Court had continuing jurisdiction of the proceedings and was and is the proper Court to enter a final judgment, to-wit, an order either confirming or setting aside said arbitration award.

The Court of Appeals held that the Florida District Court had been divested of jurisdiction and held that the Ohio District Court was the proper Court to either confirm or set aside the arbitration award. In order to reach such holding, the Court of Appeals, of necessity, had to hold and did so hold that the order entered by the Florida District Court on October 21, 1970, insofar as the same granted the Contractor's motion to compel arbitration and granted the Surety's motion for a stay of proceedings in the Florida District Court, constituted a final judgment or order.

JURISDICTION OF THE COURT OF FIRST INSTANCE

Jurisdiction of the Court of first instance, for the purpose of these proceedings and under this Court's Rule 23(g) is presumed to be the District Court of the Southern District of

Florida, Miami Division. The jurisdiction thereof was purportedly based upon Title 28, United States Code, Section 1332, which was allegedly removed under the provisions of Title 28, United States Code, Section 1441. (However, the Petitioner contends that said Florida District Court never properly obtained jurisdiction in that said Petition for Removal was obviously defective as was recognized by the said Florida District Court and Respondents by the filing of the Respondent's "Cross-Motion to Amend Petition for Removal", by the entry Order of the Florida District Court granting the motion to amend said Petition for Removal and by the filing of the Amended Petition for Removal (said Petition for Removal being filed on June 22, 1970 and the Amended Petition being filed over four (4) months later).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

In its present posture, the instant proceedings raised the troublesome question of whether the Florida District Court or the Ohio District had jurisdiction and venue of these proceedings at the current stage thereof. The answer to such question turns upon a determination of whether an order of reference to arbitration in pending legal proceedings is a final order or an interlocutory order. The question arises because of the Petitioner's previous reliance upon this Court's hereinafter cited opinions and because of the conflict of opinions in the Courts of Appeal. The Petitioner, City of Naples, contends that the Florida District Court has continuing jurisdiction and venue of the proceedings and the Contractor and Surety contend conversely that jurisdiction and venue is vested in the Ohio District Court. Each of said District Courts held that it has jurisdiction and constitutes the proper venue.

The contention of the City is based, in part, upon the proposition that among various other orders, the order of the

Florida District Court denying Petitioner's Motion to Remand and the Order granting a stay of the Florida District Court proceedings and requiring arbitration were not final orders or final judgments, but instead, if appealable at all, were appealable solely as interlocutory orders. The Court of Appeals tacitly recognized that if this position is correct, the Florida District Court must, of necessity, have jurisdiction for the purpose of entering a final order so that said previous interlocutory orders become absolutely reviewable. Otherwise, such interlocutory orders would enter the ether and remain in a perpetual state of limbo. The Court of Appeals recognized the well established rule that the denial of a Motion to Remand does not constitute a final order, but, in reaching its ultimate conclusion that the Ohio District Court was vested with jurisdiction, held in its opinion of February 22, 1974 that "the Stay Order and Arbitration Order were appealable" and, as stated in its opinion on rehearing, held "the Arbitration Order was an appealable final order within the meaning of 28 U.S.C. Section 1291". The Court of Appeals in reaching this conclusion stated in its opinion on rehearing "in this area of the law where there are 'medieval if not Byzantine peculiarities,' New England Power Co. v. Asiatic Petroleum Corp., 456 F.2d 183 at 189 (1st Cir. 1972), this Circuit has spoken." In reaching such conclusion, the Court of Appeals has impaled the Petitioner upon what the Court considers medieval, if not Byzantine peculiarities contrary to the express holdings of this Supreme Court. Petitioner will concede that the decisions in this area, as between Courts of Appeals, are in conflict. However, Petitioner believes that this Court has clearly established the rules of law applicable to the instant situation, which rules as established by this Court are in conflict with the opinions of the United States Court of Appeals, Fifth Circuit.

In the first of the two (2) controlling opinions of this Court, to-wit, Shanferoke Coal & Supply Corporation v.

Westchester Service Corporation, 293 U.S. 449 (1935), this Court reviewed an order of the United States Circuit Court of Appeals for the Second Circuit wherein said Court of Appeals had reversed an order of the District Court of the United States for the Southern District of New York denying a stay of action for damages for breach of contract until arbitration should be had in accordance with the terms of the contract. This Court affirmed the Court of Appeals decision. In affirming such decision, this Court held that the order staying the proceedings entered by the District Court was an appealable interlocutory order. Preliminary to deciding that question, this Court held that the order of the District Court denying the stay was not a final judgment appealable under then Section 128 of the Judicial Code, U.S.C. Title 28, Section 225. Thus, this Court has previously specifically held that such an order is not a final judgment and is appealable only as an interlocutory order. Accordingly, such order was an order which the Appellant in such case had the right to either have reviewed on an interlocutory appeal or which the said Appellant could have subsequently had reviewed upon appeal of a final judgment. Concededly, the opinion of this Court in Shanferoke, supra., related only to the appealability of a stay order and the specific question of whether an order requiring the parties to proceed to arbitration is a final order or is an interlocutory order was not considered. However, such question did arise in the case of Schoenamsgruber v. Hamburg American Line, 294 U.S. 454, (1935). In the Schoenamsgruber case, the District Court of the United States for the Northern District of California, Southern Division, entered an order requiring parties to libels in admiralty to proceed to arbitration and staying trial pending the filing of the award. In the trial proceedings the answers to the libel denied the material allegations thereof and alleged that the contract in question contained an agreement to arbitrate. The Respondents applied to the Court for arbitration under the United States Arbitration Act, Title 9, U.S.C., and the District

Court ordered the parties to proceed to arbitration and stayed the trial of the action pending the filing of the award. The Circuit Court of Appeals, Ninth Circuit, held such orders to be interlocutory and non appealable and dismissed the appeal taken from the District Court opinion. This Supreme Court held that such orders were not final orders and therefore, were not appealable under then Section 128 Judicial Code, U.S.C. Title 28, Section 225. This Court thereupon considered the question of whether or not such orders were interlocutory orders appealable under Section 129, Judicial Code, U.S.C. Title 28, Section 227, and held that orders requiring parties to proceed to arbitration were not appealable interlocutory orders and that, therefore, the same could be reviewed only on appeal from the final decrees.

The Fifth Circuit Court of Appeals, acknowledging that medieval peculiarities exist in this area of the law, attempted to distinguish the Schoenamsgruber case only on the basis that the same was an admiralty case and on the basis that the Court of Appeals two years after entry of the opinion in Schoenamsgruber, held that an order denying a Section 4 petition under Title 9 U.S.C. to compel arbitration was a final judgment and was therefore, appealable only as a final judgment and was not subsequently reviewable when the ultimate arbitration award became a final judgment of the Court.

Notwithstanding the Court's above holdings, there is case law that sets forth a distinction between whether or not the proceedings under review relate to an original petition seeking to have the matter under consideration referred to arbitration as contrasted to the raising of the arbitration provisions of a contract as a defense in pending litigation. Even if valid, such distinction would not be applicable in the case sub judice because in the instant case, the motion for stay and for order of reference to arbitration was first raised in pending litigation.

This distinction is recognized and pointed out by the United States Court of Appeals, Second Circuit, in the case of Chatham Shipping Co. v. Fertex Steamship Corporation, 352 F.2d 291 (2nd Cir. 1965). In such case that Court stated at page 249 of its opinion "However, the rule of this Court, established after full consideration, is that although an order directing arbitration is interlocutory when made in the course of continuing litigation, it is considered a final decision when handed down in an independent proceeding under Section 4 of the Arbitration Act" (emphasis supplied). It is clear that in the instant case there was no independent proceeding attempting to enforce the provisions of Section 4 of the Arbitration Act but instead, the motions relating thereto were filed in a pending action at law as a defense to such legal proceedings.

The United States Court of Appeals, Second Circuit, further discussed the above distinction in the case of Farr Co. v. C.I.A. Intercontinental De Navegacion, 243 F.2d 342 (1957). In Farr, supra., the Court of Appeals pointed out that before the case could be considered, the Court had to first determine whether the order in question was appealable. The Court had before it an order of the District Court requiring arbitration under a separate petition filed under Section 4 of Title 9, U.S.C. The Appellee contended that the order was interlocutory and not appealable. The Court of Appeals recognized that there might be a seeming inconsistency in the prior opinions of such Court, but stated that no such inconsistency existed in that the Court had held such orders appealable where the Order to Compel Arbitration was made in an independent proceeding under Section 4 of the Act while holding such orders not appealable when made in the course of a continuing suit. As above stated, the Petitioner herein, the City of Naples, believes such distinction to be immaterial in the instant case because of the fact that the distinction relates to whether said orders are appealable as interlocutory orders and not whether they

constitute final judgments. A review of the record will reveal that the Respondents herein never, in fact, moved for any order under Section 4 specifically but instead, simply moved for a stay under Section 3 of Title 9 and supplementary thereto, requested only in general terms that an order be entered requiring arbitration. However, the opinions of the Fifth Circuit and Second Circuit are in direct conflict with each other with relation to such point of law and the Fifth Circuit opinions are in conflict with the decisions of this Court.

That the order in question was not a final order (as conclusively established under this Court's above cited decisions) is further buttressed by the fact that in the instant case there were orders entered by the Florida District Court subsequent to the entry of the October 21, 1970 order and that the proceedings were of a continuing nature. For example, the order of October 21, 1970 granted the Respondents herein ten (10) days within which to file an amendment to their defective Petition for Removal. Thus, jurisdiction of the District Court admittedly could not become complete until after the entry of the order of October 21, 1970. In fact, an amended Petition for Removal was filed on October 30, 1970. On November 20, 1970, the City filed a renewal of its Motion to Remand and Motion for Stay of Arbitration, and such order was denied by order dated November 30, 1970. Furthermore, as reflected by the record, the Surety refused to become a party to the arbitration proceedings and the Arbitration Association refused to require the Surety to be a party thereto. Clearly, it was anticipated that in the event the Petitioner herein received an award which required the Contractor to pay damages to Petitioner, the Petitioner would be required to pursue in the Florida District Court proceedings attempting to secure judgment against the Surety.

Because of the foregoing it is abundantly clear that the Court of Appeals, as a matter of law, erred in holding that the orders of the District Court were final orders or final judgments, and it necessarily follows that the Florida District Court retained jurisdiction for the purpose of entering a final order or judgment herein, upon the entry of which the orders relating to stay of proceedings, denial of Motion to Remand and Order requiring arbitration would become appealable.

With regard to the second question to be considered by this Court, to-wit, which of the two (2) trial courts would have jurisdiction but for the fact that said orders of the Florida District Court were interlocutory and not final orders, the Petitioner respectfully submits that the opinion of the Court of Appeals is in conflict with holdings of other Courts of Appeal and is in conflict with the clear intent of the respective provisions of Title 9, U.S.C. With regard to the latter point, it should again be noted that Section 4 relates to a separate proceeding for an order requiring arbitration. Likewise, Section 9 of Title 9 under which the Contractor now attempts to have the award of arbiters confirmed, is a separate proceeding. The clear intent of Section 9 is for the confirmation of an award where arbitration has been held either without the entry of an order requiring arbitration or where an order requiring arbitration has been entered under a separate proceeding by virtue of the terms of Section 4. Certainly, neither Section was intended to apply to arbitration proceedings which were already the subject matter of an impending and continuing controversy over which a Federal District Court had already assumed jurisdiction. It is this latter point which, in reality, places the Court of Appeals, Fifth Circuit, in conflict with decisions of other Courts of Appeal. The Fifth Circuit has in essence held that the reference to arbitration by the Florida District Court and the confirmation thereof are totally separate legal proceedings (and this holding is made notwithstanding the continuing nature of

the Florida District Court proceedings). The Circuit Court of Appeals, Second Circuit, has specifically held that such proceedings are not independent proceedings but instead, are one continuing proceeding. For example, see Marchant v. Mead-Morrison Mfg. Co. 29 F. 2d 40 (2nd Cir. 1928), wherein the Supreme Court of the State of New York entered an order directing the parties to proceed in arbitration in accordance with their contract. Ultimately, after other proceedings, an award was entered by the arbiters. The Plaintiff in such arbitration proceedings then moved in the State Court for an order confirming the award and for the entry of judgment. Thereupon, the Defendant filed a Petition to Remove the Suit to the Federal District Court. The Plaintiff then moved to remand the case to State Court and such Motion for Remand was denied. The Defendant moved to vacate the award and the Plaintiff moved to confirm the award. In discussing the case before it, the Court of Appeals, Second Circuit, stated that when the suit was removed after the arbiters had made their award, it was upon the theory that the appointment of the arbiter was one proceeding and the application for judgment on that award was another or second suit. The Court of Appeals disagreed with such contention and specifically held, at page 43 of its opinion that such proceedings constituted

> "... all one arbitration proceeding, to settle the controversies which had arisen between the parties. They were not separable controversies. ....The proceedings from the outset had all the elements of a judicial controversy, to wit, adversary parties and an issue, in which the claim of one of the parties against the other capable of pecuniary estimation, was stated and answered in the same form of pleading. ....The appointment of the arbitrator was

> but a step in the relief sought by the plaintiff from the damages inflicted by the breach of contract. Having commenced the suit in the state court on an application for the appointment of the arbitrator, it would not have been permissable for the plaintiff to have proceeded later for its confirmation in the District Court of the United States upon the theory of a diversity of citizenship. . . ."

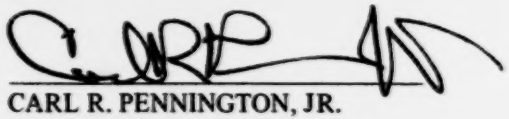
Also see Hetherington & Berner, Inc. vs. Melvin Pine & Co., 256 F. 2d 103 (2nd Cir. 1958) wherein the same Court held that where the Federal District Court had assumed jurisdiction and had entered an order "tantamount to an order of the Court that the parties arbitrate", Hetherington, supra., at 107, it was proper that proceedings in the State Court seeking to vacate an ultimate award of the arbiters be removed to the District Court inasmuch as the Motion to Vacate was in essence ancillary to and a continuation of the earlier suit. For these reasons, the opinion of the Fifth Circuit Court of Appeals that a petition seeking confirmation or vacation of an arbiters award is a separate proceeding is erroneous and is in direct conflict with the clear meaning of the applicable Federal Statutes and is in conflict with opinions of other Circuit Courts of Appeal.

CONCLUSION

The opinions of the Fifth Circuit and of the Second Circuit are clearly in conflict on the above matter, and the Fifth Circuit opinions are clearly in conflict with the decisions of this Court. Such Courts, in essence, admit the confusion and conflicts. It is important that this Court reiterate its prior holdings and clarify this area of law. Otherwise, other litigants will find themselves in the same predicament as Petitioner. Because

of such conflict, the Petitioner relied upon the holdings of this Court and treated the pertinent orders as interlocutory, but because of such conflicts, the Petitioner now finds that it has been deprived of substantial legal rights.

Respectfully submitted,



CARL R. PENNINGTON, JR.
of the law firm of
Pennington, Wilkinson & Sauls
Post Office Box 3985
Tallahassee, Florida 32303

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, together with a copy of Appendix, has been served upon each of the following: Hynes and Diamond, 25 Broadway, New York, N. Y. 10004; Blackwell, Walker, Gray and Powers, First Federal Building, 100 N. E. 1st Avenue, Miami, Florida 33132; John C. Ausley, P. O. Box 391, Tallahassee, Florida, Attorneys for Respondents, by mail this 5th day of July, 1974.

Attorneys for Petitioner

CITY OF NAPLES, Plaintiff-Appellee,

v.

The PREPAKT CONCRETE COMPANY and American Employers' Insurance Company, Defendants-Appellants.

No. 73–1367.

United States Court of Appeals,
Fifth Circuit.

Feb. 22, 1974.

Florida city brought action in state court against Ohio corporation and its surety. The Ohio corporation removed case and successfully obtained stay of suit and an order compelling arbitration. Following arbitration which was conducted in Ohio, the Ohio corporation moved the United States District Court for the Northern District of Ohio to confirm the award. The United States District Court for the Southern District of Florida, Emett C. Choate, J., issued an injunction against further proceedings in the matter in any United States court other than the District Court for the Southern District of Florida. The Ohio corporation appealed. The Court of Appeals, Godbold, Circuit Judge, held that the Florida city waived its right to object to the Ohio locale for arbitrations selected by arbitration association when the city agreed in arm's length commercial contract to abide by the association's decision as to arbitration locale and that where the arbitration hearings had lawfully taken place in Ohio, diversity of citizenship existed and more than $10,000 was in controversy, the Ohio District Court was the proper court to confirm, vacate, modify, or correct the arbitration award.

Injunction vacated with direction.

Synopses, Syllabi and Key Number Classification
COPYRIGHT © 1974, by WEST PUBLISHING CO.

The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

Appendix A

1. Arbitration and Award ⇐46

A proper locale for an arbitration hearing compelled by a federal court is waivable. 9 U.S.C.A. §§ 4, 9–11.

2. Arbitration and Award ⇐46

By agreeing in an arm's length commercial contract to abide by arbitration association's decision as to arbitration locale in case of dispute with Ohio corporation, city in Florida waived its right to oppose arbitration association's choice of Cleveland, Ohio, as the locale for the arbitration hearing. 9 U.S.C.A. §§ 4, 9–11.

3. Arbitration and Award ⇐72, 76

Where city in Florida had waived its objection to Cleveland, Ohio, as the locale for arbitration hearing, there was diversity of citizenship and more than $10,000 was in controversy, the United States District Court in Ohio was the proper court to confirm, vacate, modify, or correct the award in arbitration between the Florida city and Ohio corporation. 9 U.S.C.A. §§ 4, 9–11.

4. Contracts ⇐292½

Orders which granted stay of suit and which ordered arbitration between Florida city and Ohio corporation were appealable orders. 9 U.S.C.A. §§ 4, 9–11.

5. Arbitration and Award ⇐80

Where arbitrators absolved Ohio corporation and entered an award in its favor in dispute with Florida city, Ohio corporation's surety's liability to the Florida city was extinguished unless federal court in Ohio should modify the award in such a way as to hold the surety liable. 9 U.S.C.A. §§ 4, 9–11.

Appeal from the United States District Court for the Southern District of Florida.

Before THORNBERRY, GODBOLD and CLARK, Circuit Judges.

GODBOLD, Circuit Judge:

Prepakt, an Ohio corporation, and the City of Naples, Florida, entered into a contract that contained an arbitration clause. The contract did not specify the place where arbitration hearings, should they become necessary, would be held, but it implied that any dispute over locale was to be decided by the American Arbitration Association.[1] When a dispute arose the City sued Prepakt and its surety, American Employers' Insurance Company, in state court in Florida. Prepakt removed the case to the United States District Court for the Southern District of Florida and there successfully moved to stay the City's suit and to compel arbitration.

Prepakt's motion did not state where arbitration was to take place nor did the District Judge's order specify a locale. Prepakt wanted to arbitrate in Cleveland, Ohio,[2] but the City did not. The American Arbitration Association directed, over the City's objection, that the arbitration take place in Cleveland. The arbitration proceeded there and the arbitrators awarded Prepakt $90,000.

The statute empowering federal courts to compel arbitration states that the "hearing and proceedings . . . shall be within the district in which the petition for an order directing such arbitration is filed." 9 U.S.C. § 4 (1970). After arbitration was completed, however, different sections of the federal arbitration statute came into play, stating that an application to confirm the award "may be made to the United States court in and for the district within which such award was made," id. § 9, and that under appropriate circumstances, upon application of a party to the arbitration, the United States court in and for the district in which the award was made may vacate, modify, or correct an award. Id. §§ 10, 11.

1. The contract incorporated by reference the Construction Industry Arbitration Rules of the American Arbitration Association, which give the A.A.A. power to determine locale in cases of disagreement.

2. The District Court had before it several documents showing that this was the locale contemplated by Prepakt.

Pursuant to § 9, Prepakt moved the District Court for the Northern District of Ohio to confirm the award. At this point the City returned to the District Court in Florida, called the Judge's attention to § 4, and secured an injunction against further proceedings in the matter in any United States court other than the District Court for the Southern District of Florida.[3] Prepakt appeals from that injunction.

Prepakt argues that the Florida federal court departed from the federal arbitration statute by issuing an injunction and thus taking jurisdiction over the parties' dispute as to the correctness of the award. It urges that §§ 9–11 confer jurisdiction to confirm, vacate, modify, or correct an award exclusively upon the District Court in Ohio. As to the setting of a locale different from that of the arbitration-compelling court, in arguable conflict with § 4, Prepakt insists that the City waived its right to object by waiting too long to bring § 4 to the attention of the District Judge in Florida.

The City frames the issues differently. Arguing that there is a stayed but still pending suit in the District Court in Florida, it insists that nothing has happened to divest that court of jurisdiction to enjoin proceedings elsewhere.[4] Moreover, if the award is reviewed in Ohio rather than Florida, argues the City, it will be necessary to press appeals in two circuits in order to secure appellate review of the Florida District Court's threshold actions—denying the City's motion to remand to state court, staying the contract suit, and compelling arbitration—as well as of the Ohio District Court's decision on the merits of the award.

3. The court also commanded that the arbitration record be transmitted to it, presumably for confirmation, vacation, modification, or correction.

4. The City buttresses its position by urging that since Prepakt's surety, American Employers' Insurance Company, refused to appear or participate in the arbitration proceedings, the issue of the City's rights against the surety is still before the District Court in Florida.

[1, 2] Section 4's statement about the proper locale for an arbitration hearing compelled by a federal court is analogous to a venue provision,[5] and thus is waivable. We hold that by agreeing in an arm's length commercial contract to abide by the A.A.A.'s decision as to arbitration locale in cases of dispute, see note 1 *supra*, the City waived its right to oppose an Ohio locale.

[3] The City may be technically correct in urging that the federal court in Florida retained jurisdiction over the stayed lawsuit. Nevertheless, in view of § 9's command, and for reasons of judicial restraint and comity, the District Judge should have declined to enjoin the confirmation proceeding in the Ohio District Court. See Reed & Martin, Inc. v. Westinghouse Elec. Corp., 439 F.2d 1268, 1272–1273 (C.A. 2 1971). The arbitration hearing had lawfully taken place in Ohio, because of the City's waiver of the § 4 venue designation. Diversity of citizenship existed and more than $10,000 was in controversy.[6] Therefore, under § 9, the Ohio District Court was the proper court to confirm, vacate, modify, or correct the arbitration award. See id. at 1276.

5. Cf. Farr & Co. v. Cia. Intercontinental de Navegacion, 243 F.2d 342 (C.A. 2 1957), in which the Second Circuit held that a party's contractual agreement to arbitrate in a particular place gave the federal district court of that place (assuming it already had subject matter jurisdiction) *in personam* jurisdiction for purposes of compelling the party under § 4 to arbitrate. In the present case the contract specified no particular place, but the parties designated a method for choosing a place. See note 1 *supra*.

The City urges that Prepakt could have secured an Ohio arbitration locale without fear of transgressing § 4 by petitioning in the federal district court in Ohio to compel arbitration, and that by not having done so Prepakt in effect chose Florida as the locale for arbitration (and by implication for review of the award under §§ 9–11). But locale, if disputed, was not for Prepakt to choose at all. Both parties had surrendered that choice to the A.A.A., and it makes no difference whether the A.A.A. made a final choice before the petition to compel arbitration was filed (in which case the petitioning party would have known what court to file in) or afterward.

6. We do not hold that diversity and amount in controversy were necessary to confer jurisdiction under § 9, but only note that in this case they were present.

[4] We are not persuaded by the City's insistence that it will have to appeal in two circuits in order to secure review of all the issues in the case. The stay order and arbitration order were appealable.[7] Since the time for appealing them has long since run out, the City has lost its right to have them reviewed. The denial of the motion to remand, although it would not have been immediately appealable standing alone, nevertheless was reviewable in conjunction with the stay and arbitration orders. See Peters v. Standard Oil of Texas, 174 F.2d 162, 164 (C.A. 5 1949). Thus time has run out on it, too.

[5] Finally, we are unpersuaded by the City's insistence, see footnote 4 *supra*, that its action against Prepakt's surety in the Southern District of Florida somehow survives. The surety's liability is contingent upon Prepakt's liability. Since the arbitrators absolved Prepakt and entered an award in its favor, the issue of the surety's liability is necessarily extinguished too, unless, of course, the District Court for the Northern District of Ohio should modify the award in such a way as to hold Prepakt liable.

The injunction of the District Court for the Southern District of Florida is vacated with direction that the arbitration record be transmitted to the District Court for the Northern District of Ohio.

7. See Southeastern Enameling Corp. v. General Bronze Corp., 434 F.2d 330 (C.A. 5 1970), in which we held that an order granting a stay pending arbitration was analogous to an injunction order and hence appealable under 28 U.S. § 1292(a)(1) (1970). The same rationale applies to orders compelling arbitration. In fact, if anything it applies with additional force in the case of such orders. Compare New England Power Co. v. Asiatic Petroleum Corp., 456 F.2d 183 (C.A. 1 1972), in which the First Circuit, unlike this circuit, held a stay order nonappealable yet stated that an order compelling arbitration is appealable.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

CITY OF NAPLES, Plaintiff-Appellee,

v.

The PREPAKT CONCRETE COMPANY and American Employers' Insurance Company, Defendants-Appellants.

No. 73–1367.

United States Court of Appeals,
Fifth Circuit.

May 23, 1974.

Florida city brought action in state court against Ohio corporation and its surety. The Ohio corporation removed the case and successfully obtained stay of suit and order compelling arbitration. Following arbitration which was conducted in Ohio, the Ohio corporation moved the United States District Court for the Northern District of Ohio to confirm the award. The United States District Court for the Southern District of Florida, Emett C. Choate, J., issued an injunction against further proceedings in the matter in any United States Court other than the District Court for the Southern District of Florida. The Ohio corporation appealed. The Court of Appeals, 490 F.2d 182, vacated the injunction with directions. On petition for rehearing, the Court of Appeals, Godbold, Circuit Judge, held that arbitration order was an appealable final order.

Rehearing denied.

1. Contracts ⇐292½

Order directing arbitration of dispute between Florida city and Ohio corporation was appealable. 9 U.S.C.A. §§ 3, 4; 28 U.S.C.A. § 1291.

Synopses, Syllabi and Key Number Classification
COPYRIGHT © 1974, by WEST PUBLISHING CO.
The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

INDEXED

Appendix B

2. Contracts ⇐292½

Denial of motion to remand was not immediately appealable standing alone but became appealable when it merged with final arbitration order.

Appeal from the United States District Court for the Southern District of Florida.

ON PETITION FOR REHEARING

(Opinion February 22, 1974, 5 Cir., 1974, 490 F.2d 182).

Before THORNBERRY, GODBOLD and CLARK, Circuit Judges.

GODBOLD, Circuit Judge:

The City's petition for rehearing questions the correctness of the holding that the arbitration order of the District Court for the Southern District of Florida was appealable and that the city is time-barred from now appealing therefrom. The petition relies upon Schoenamsgruber v. Hamburg American Line, 294 U.S. 454, 55 S.Ct. 475, 79 L.Ed. 989 (1934), for the proposition that an order granting arbitration is interlocutory and reviewable only upon appeal from final decree. Two years after *Schoenamsgruber* was decided this circuit noted that that decision was in an admiralty case and held that an order denying a § 4 petition to compel arbitration, entered in a suit at law claiming damages for breach of contract, was a final judgment and appealable. La Nacional Platanera v. North American Fruit & Steamship Corp., 84 F.2d 881 (CA5, 1936). For a statement of reasons supporting the correctness of our analysis of *Schoenamsgruber* see The Sydfold, 25 F.Supp. 662 (S.D.N.Y.1938). In *La Nacional* the order denied arbitration while in the instant case it granted arbitration. The latter is an *a fortiori* situation—the court by deliberative act has set in motion the arbitration, and the arbitrators take over the controversy and dispose of it subject only to possible application to a court to vacate or to enforce the award. For a discussion of the "functional" finality of an arbitration-com-

pelling order see Krauss Bros. Lumber Co. v. Louis Bossert & Sons, 62 F.2d 1004 (CA2, 1933).[1]

There are policy reasons pro and con in holding for appealability of orders entered under § 4, and at least one other circuit has held them appealable under neither 28 U.S.C. § 1291 nor *id.* § 1292(a)(1). Blount Bros. Construction Co. v. Troitino, 127 U.S.App.D.C. 99, 381 F.2d 267 (1967).[2] But in this area of the law where there are "medieval if not Byzantine peculiarities," New England Power Co. v. Asiatic Petroleum Corp., 456 F.2d 183 at 189 (CA1, 1972), this circuit has spoken.

[1, 2] We, therefore, amend the third from the last paragraph of our opinion [490 F.2d 182] so as to read as follows:

> We are not persuaded by the City's insistence that it will have to appeal in two circuits in order to secure review of all the issues in the case. The arbitration order was an appealable final order within the meaning of 28 U.S.C. § 1291. See La Nacional Platanera v. North American Fruit & Steamship Corp., 84 F.2d 881 (CA5, 1936). Since the time for appealing it has long since run out, the City has

1. Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U.S. 449, 55 S.Ct. 78, 79 L.Ed. 583 (1935), is not contrary to our holding. There an order denying a stay pending arbitration was held not final, although it was deemed appealable as an interlocutory injunction within the meaning of 28 U.S.C. § 1292(a)(1). The present case concerns not a 9 U.S.C. § 3 stay order alone, but a § 4 arbitration order, which stands on a different footing. See The Sydfold, 25 F.Supp. at 663; New England Power Co. v. Asiatic Petroleum Co., 456 F.2d 183, 188 (CA1, 1972). Since the arbitration-compelling order was final, all that had gone before, including the stay order and the denial of the motion to remand, merged with it and became mandatorily appealable. See 9 Moore's Federal Practice ¶ 110.07 at 109, text accompanying note 13.

2. See also Standard Chlorine of Delaware v. Leonard, 384 F.2d 304 (CA2, 1967), in which the Second Circuit rationalized its previously inconsistent decisions by distinguishing between the case where the § 4 order is entered in an independent proceeding and that where entered as a collateral matter in a pending case. And see Goodall-Sanford, Inc. v. United Textile Workers, 353 U.S. 550, 77 S.Ct. 920, 1 L.Ed.2d 1031 (1953) (order directing arbitration under § 301(a) of the Taft-Hartley Act held appealable as final order).

lost its right to have it reviewed. The denial of the motion to remand, although it would not have been immediately appealable standing alone, merged with the final arbitration order and became reviewable. Thus time has run out on it, too.

Also we delete footnote 7 [p. 184].

On the basis of our opinion as amended and as supplemented by this order, the petition for rehearing is denied.

Adm. Office, U.S. Courts—West Pu' ' ing Company, Saint Paul, Minn.

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

June 10, 1974

600 Camp St. - Rm. 102
New Orleans, La. 70130

Mr. Carl R. Pennington, Jr.
Attorney-at-Law
P.O. Box 3985
Tallahassee, Florida 32303

No. 73-1367 - City of Naples vs. The Prepakt Concrete Company and American Employers' Insurance Company.

MANDATE STAYED TO: July 10, 1974
(See order enclosed)

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

Enclosed is a copy of the opinion, judgment and order denying rehearing which are still required by the Supreme Court to be incorporated as an appendix to your petition.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Lawrence Lee
Deputy Clerk

enc.
cc and copy of order:

Mr. Mark Hicks
Mr. John C. Ausley
Mr. Leslie Hynes
Mr. Charles K. Allan

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
JUN 10 '74
EDWARD W. WADSWORTH
CLERK

CITY OF NAPLES,

Plaintiff-Appellee,

versus

THE PREPAKT CONCRETE COMPANY and AMERICAN EMPLOYERS' INSURANCE COMPANY,

Defendants-Appellants.

No. 73-1367

ON CONSIDERATION OF THE APPLICATION of the appellee in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issuance of the mandate of this Court in said cause be, and the same is stayed for a period of 30 days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within 30 days from the date of this order there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed. IT IS FURTHER ORDERED that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of 30 days from the date of this order, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

UNITED STATES CIRCUIT JUDGE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1973

No. 73-1367

D. C. Docket No. CA 70-923

CITY OF NAPLES,
Plaintiff-Appellee,

versus

THE PREPAKT CONCRETE COMPANY and
AMERICAN EMPLOYERS' INSURANCE COMPANY,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Florida

Before THORNBERRY, GODBOLD and CLARK, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the injunction of the District Court in this cause be, and the same is hereby, vacated with direction that the arbitration record be transmitted to the District Court for the Northern District of Ohio in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellee pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

February 22, 1974

Issued as Mandate:

FILED
AUG 3 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. ...73-1991

CITY OF NAPLES,

Petitioner,

vs.

THE PREPAKT CONCRETE COMPANY and AMERICAN EMPLOYERS' INSURANCE COMPANY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

LESLIE A. HYNES
Counsel for Respondents
25 Broadway
New York, N. Y. 10004

HYNES & DIAMOND
Of Counsel

Cases:

Baltimore Contractors, Inc. v. *Bodinger*, 348 U.S. 176 (1955) 4, 5

County of Middlesex v. *Gevyn Construction Corp.*, 450 F.2d 53, cert. den. 405 U.S. 955 (1971) 3

Enelo v. *New York Life Insurance Co.*, 293 U.S. 379 (1935) 5

Farr & Co. v. *Cia Intercontinental de Navigacion*, 243 F. 2d 342 (2 Cir. 1957) 7

La Nacional Platanera v. *North American Fruit and Steamship Corp.*, 84 F. 2d 881 (5 Cir. 1936) 3

Mayflower Industries v. *Thor Corp.*, 184 F.2d 537 (3 Cir. 1950) 2

New England Power Company v. *Asiatic Petroleum Corporation*, 456 F.2d 183 (1 Cir. 1972) 3, 4

Reed & Martin Inc. v. *Westinghouse Electric Corp.*, 439 F.2d 1268 (2 Cir. 1971) 8

Schoenamsgruber v. *Hamburg American Line*, 294 U.S. 454 (1935) 4, 5

Shanferoke Coal & Supply Corporation v. *Westchester Service Corporation*, 293 U.S. 449 (1935) 4, 5

Standard Chlorine of Delaware, Inc. v. *Leonard*, 384 F.2d 304 (2 Cir. 1967) 3

Sydfold, The, 25 F. Supp. 662 (S. D. N. Y. 1938) 5, 6

Willoughby v. *Sinclair Oil & Gas Co.*, 188 F.2d 902 (10 Cir. 1951) 2

Statutes:

9 U. S. C. § 4 ..... 3, 5, 6, 9, 10

9 U. S. C. § 9 ..... 8, 9, 10

28 U. S. C. § 1291 ..... 3, 4, 5, 10

28 U. S. C. § 1292(a)(1) 2, 4, 5

Other Authority:

14 Moore's Federal Practice 1481 ¶ 0.160[2.-2] 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

CITY OF NAPLES,

Petitioner,

vs.

THE PREPAKT CONCRETE COMPANY and AMERICAN EMPLOYERS' INSURANCE COMPANY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Respondents respectfully submit that the Petition for Writ of Certiorari should be denied in all respects since it is clear from the opinion of the United States Court of Appeals for the Fifth Circuit, as amended and from the authorities cited therein, that there are no inconsistencies or conflicts, inherent or otherwise, among any of the several circuits or in this honorable court in respect of the "same point of law" which is the subject of the decision of the Fifth Circuit Court of Appeals.

Respondents do not contest the statements contained in the petition concerning the alleged grounds on which the jurisdiction of this court is invoked, nor the time factors upon which such alleged jurisdiction rests.

Similarly, Respondents believe that the petition fairly sets forth the applicable Federal statutes involved with the possible exception of 28 U.S.C. § 1292(a)(1) (1970), which provides as follows:

> § 1292. Interlocutory decisions
>
> (a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

Respondents also believe that the petition sets forth a fair statement of the case and facts with the exception of the inaccuracies and omissions hereinafter referred to.

Respondents submit Petitioner's assertions regarding the jurisdiction of the court of first instance are erroneous. The granting of Respondents' cross-motion to amend their petition for removal was within the sound discretion of the District Court for the Southern District of Florida. If Petitioner took serious issue with the granting of the cross-motion, it could have promptly appealed that court's order of October 21, 1970 and raised the propriety of that portion of the order which denied its motion for remand. See *Willoughby* v. *Sinclair Oil & Gas Co.*, 188 F.2d 902 (10 Cir. 1951); *Mayflower Industries* v. *Thor Corp.*, 184 F. 2d 537 (3 Cir. 1950); 1A Moore's Federal Practice 1481 *et seq.*, ¶ 0.169 [2.-3].

Accordingly, and for the reasons which follow, it is submitted that there are no questions presented for review by this court and the petition should be denied in all respects.

The first question which Petitioner alleges to arise from the Court of Appeals' opinions of February 22 and May 23, 1974 is "whether the Order of the United States District Court, Southern District of Florida, entered on October 21, 1970, granting the contractor's motion to compel arbitration and staying the Court proceedings constituted a final judgment or order or constituted an interlocutory order". It is submitted that Petitioner has gone a long way towards answering this question. In the opening two lines under the heading "Questions presented for review" on page 2 of the petititon, vis:

> "The Petitioner, City of Naples, on May 26, 1970, filed an action at law * * *"

This was an action at law for damages for breach of contract brought in the State court in Florida, and this action at law was thereafter removed to the United States District Court for the Southern District of Florida in which latter court Respondents successfully moved for a stay of the action and an order compelling the parties to proceed to arbitration, as provided under the provisions of 9 U.S.C. § 4 (1970).

It is well settled that the District Court's order entered on motion of one of the parties under 9 U.S.C. § 4 compelling arbitration is appealable as a final order under 28 U.S.C. § 1291. *New England Power Company* v. *Asiatic Petroleum Corporation*, 456 F. 2d 183, 188 (1 Cir. 1972); *County of Middlesex* v. *Gevyn Construction Corp.*, 450 F. 2d 53, cert. den. 405 U.S. 955 (1971); *Standard Chlorine of Delaware, Inc.* v. *Leonard*, 384 F. 2d 304, 308 (2 Cir. 1967); *La Nacional Platanera* v. *North American Fruit and Steamship Corp.*, 84 F. 2d 881 (5 Cir. 1936).

Petitioner seeks to obfuscate the facts involved herein by referring to certain dicta appearing in the decision of the United States Court of Appeals for the 1st Circuit in the case of *New England Power Company* v. *Asiatic*

Petroleum Corp., supra, in its reference to (456 F.2d at p. 189) "Byzantine peculiarities of this area of the law * * *".

Clearly, the whole area of law under discussion in the *New England Power Company* v. *Asiatic Petroleum Corp.,* case, *supra,* was the determination of whether the District Court's denial of the plaintiff-appellant's motion for a stay of arbitration and a granting of the defendant-appellee's motion for a stay of court proceedings pending arbitration was a final order within the meaning of 28 U.S.C. § 1291, in an action where the original underlying relief sought was equitable in nature, rather than an action at law. The "Byzantine peculiarities" referred to by the First Circuit Court of Appeals emanated from circumstances in which, unlike the present circumstances, equitable relief was demanded and the distinctions which were thereby made prior to the merger of law and equity and which precedents are still adhered to by this court as "better judicial practice * * * leaving Congress to make such amendments as it may find proper." *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U.S. 176, 185 (1955). The distinctions, however, only concern cases in which the underlying relief sought is equitable in nature. In the instant matter, Petitioner's underlying action in the Florida State Court was an action at law for damages, and accordingly cannot be saved by the luxury of "impalement" which Petitioner gratuitously or be it erroneously, attributes to the decision of the Circuit Court of Appeals.

Petitioner's reliance on the cases of *Shanferoke Coal & Supply Corporation* v. *Westchester Service Corporation,* 293 U.S. 449 (1935), and *Schoenamsgruber* v. *Hamburg American Line,* 294 U.S. 454 (1935), in support of its contention that the October 21, 1970 order of the Southern District Court of Florida was not a final order, is wholly misplaced and demonstrates Petitioner's lack of comprehension of the significance of 28 U.S.C. § 1292(a)(1), ". . . which makes an exception to the requirement of

finality, permitting appeals from interlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.'" (*Baltimore Contractors, Inc.* v. *Bodinger, supra,* 348 U.S. 176 at p. 180). While it is true that this court held, in *Shanferoke,* that the order of the District Court denying the stay was not a final judgment appealable under Sec. 128 of the Judicial Code (now 28 U.S.C. § 1291), it was, even though interlocutory, appealable to the Circuit Court of Appeals under Sec. 129 of the Judicial Code (now 28 U.S.C. § 1292(a)(1)), only if the denial of the stay should be deemed the denial of the injunction (i.e., within the exception to the requirement of finality). This court found that the order was appealable under Sec. 129 of the Judicial Code, following the reasons set forth in this court's decision in *Enelo* v. *New York Life Insurance Co.,* 293 U.S. 379 (1935). Admittedly, as Petitioner concedes on p. 14 of the petition, this court in the *Shanferoke* decision did not consider the specific question of whether an order compelling the parties to proceed to arbitration, as provided for in 9 U.S.C. § 4 is a final order. It is submitted that the overwhelming weight of authority, as recognized by the decision of the Court of Appeals herein, and concerning which there is clearly no conflict among the Circuits, is that such an order is a final order.

Likewise, the case of *Schoenamsgruber* v. *Hamburg American Line, supra,* is of no avail to Petitioner's contention, and indeed, is distinguishable from the facts involved in the instant matter. As was pointed out by the decision in *The Sydfold,* 25 F. Supp. 662 (S.D.N.Y. 1938), at pp. 662-663:

> "... an order granting a petition to compel arbitration has been held final and hence appealable under section 128 of the Judicial Code, 28 U.S.C.A. § 225 [citing cases] . . .

> There is nothing to the contrary in *Schoenamsgruber* v. *Hamburg American Line*, . . . There the libellant had brought a libel in rem against the vessel and in personam against the owner. The owner demanded relief under an arbitration clause. The district court made an order directing arbitration, staying the trial of suit *and retaining jurisdiction to make further orders and decrees.* It was held that the order was not final. The order, it will be noted, was not the usual one under section 4, made in an independent proceeding for arbitration. It was an order under section 8, which is to the effect that in a case cognizable in admiralty a party claiming to be aggrieved may begin proceeding by libel and seizure of the vessel or other property in the usual way, and the court shall then have jurisdiction to order arbitration and shall retain jurisdiction to enter decree on the award. The purpose of section 8, 9 U.S.C.A. § 8 is to allow an aggrieved party the benefit of security obtained by attachment; to achieve this end, the arbitration is made a phase of the suit in admiralty. The order in the Schoenamsgruber Case, by its terms as well as by section 8 of the Act, 9 U.S.C.A. § 8, was plainly an interlocutory order."

The second question which Petitioner alleges to arise from the decision of the Court of Appeals herein is whether the United States District Court for the Southern District of Florida has jurisdiction and venue in the pending cause or whether such jurisdiction and venue is vested in the United States District Court for the Northern District of Ohio.

In its decision of February 22, 1974, the Circuit Court of Appeals very properly held that the provisions of Section 4 of Title 9 concerning the proper locale for an arbitration hearing compelled by a Federal court is analo-

gous to a venue provision, and thus is waivable. *Farr & Co.* v. *Cia Intercontinental de Navegacion,* 243 F. 2d 342 (2 Cir. 1957).

Petitioner states in its "Statement of Case and Facts," p. 9 of the petition, that arbitration hearings were commenced in Cleveland, Ohio "over the venue objection of the City . . ." but not the objection belatedly raised on appeal but simply on grounds of convenience. As the Circuit Court of Appeals herein correctly notices (footnote 1 in its decision of February 22, 1974), the arbitration agreement between Petitioner and Respondent, Prepakt Concrete Co., gave the American Arbitration Association the power to determine locale in cases of disagreement. In footnote 5 of the same decision, the Circuit Court of Appeals correctly observed that both parties had thereby surrendered the choice of locale to the AAA. Thus the court correctly concluded that "by agreeing in an arms length commercial contract to abide by the AAA's decision as to arbitration locale in cases of dispute, see note 1, supra, the City waived its right to oppose an Ohio locale" (Petition, Appendix p. 5).

The fact of the matter is that the only venue objection that the Petitioner made to an arbitration hearing in Cleveland, Ohio was to the American Arbitration Association, which objection resulted in the "disagreement" between the parties as to the locale of the arbitration, thereby empowering the AAA to determine the locale. No venue objection was ever raised by the Petitioner in the United States District Court for the Southern District of Florida. Instead, Petitioner joined the issues in the arbitration proceedings and thereafter participated in the arbitration hearings until their completion. It was only after Respondent, The Prepakt Concrete Co., filed a motion, on June 19, 1972, seeking confirmation of the arbitration award in the United States District Court for the Northern District of Ohio, Eastern Division, that the Petitioner, on

August 15, 1972, filed with the Florida District Court its various motions which were the subject of the order of the Florida District Court dated December 6, 1972 and from which the Respondents appealed to the Circuit Court of Appeals herein, and which order the Circuit Court of Appeals herein properly vacated.

A fact which the Petitioner omitted to state in its "Statement of Case and Facts" is that after Respondent, The Prepakt Concrete Company moved, on June 19, 1972 to confirm the arbitration award in the Northern District Court of Ohio, the Petitioner herein appeared in that action and objected to confirmation on the ground that the Northern District Court of Ohio lacked jurisdiction to confirm the award. It was upon this jurisdictional issue that a memorandum and order was entered in the United States District Court for the Northern District of Ohio, Eastern Division on December 18, 1972. A copy of this memorandum and order is attached in the appendix hereto.

It is abundantly clear, as was properly held in decision of the Circuit Court of Appeals herein and as concurred in by the memorandum and order of the United States District Court for the Northern District of Ohio of December 18, 1972 that under Section 9 of Title 9, U.S.C., the Ohio District Court was the proper court to confirm, vacate, modify or correct the arbitration award, *Reed & Martin Inc.* v. *Westinghouse Electric Corp.*, 439 F.2d 1268, 1276-1277 (2 Cir. 1971). As the Circuit Court of Appeals correctly pointed out (Petition, Appendix p. 5):

> "The arbitration hearing had lawfully taken place in Ohio, because of the City's waiver of the § 4 for venue designation. Diversity of citizenship existed and more than $10,000 was in controversy. Therefore, under § 9, the Ohio District Court was the proper court to confirm, vacate, modify or correct the arbitration award."

Of a special significance in this connection is the comment appearing in the memorandum and order of the United States District Court for the Northern District of Ohio dated December 18, 1972, as follows (Appendix herein, p. 12):

> "It might also be noted that were this court to order petitioner [The Prepakt Concrete Company] to seek confirmation in Florida, its order would contravene the express language of 9 U.S.C. § 9. Thus, whether or not sections 4 and 9 contemplate confirmation of the award in the district court in Florida, because jurisdiction and venue exists in this court, and because the agreement provides for confirmation in any court having jurisdiction, the award must be confirmed here."

From all of the foregoing, it is abundantly clear that the Petitioner herein, the City of Naples, Florida, waived its right to oppose to an Ohio locale for the arbitration proceedings and thereafter participated in an arbitration hearing which lawfully took place in Ohio as a result of which an award was rendered in Ohio. And, this set of circumstances brought into play different sections of the Federal arbitration statute, as the decision of the Circuit Court of Appeals herein correctly noted. While the Petitioner may be technically correct, as observed in the decision of the Circuit Court of Appeals, that the Florida District Court retained jurisdiction over the stayed lawsuit (which suit includes a cause of action by the City against the performance bond surety, Respondent American Employers Insurance Company) the Petitioner's failure to raise a Section 4 venue objection in the Florida District Court coupled with Petitioner's appearance in proceeding through the arbitration to its completion and thus bringing into play the provisions of Section 9 of Title 9, all operate to vest jurisdiction and venue in the United States District Court for the Northern District of Ohio.

Conclusion

Respondents respectfully submit that there is no conflict among any of the several circuits on the same point of law which is the subject of the decision of the Circuit Court of Appeals herein, namely, that a Section 4 order compelling arbitration is a final order appealable under 28 U.S.C. § 1291. Moreover, there is absolutely no inconsistency or conflict among the several circuits or in the Supreme Court of the United States that the locale provision of Section 4 of Title 9 is analogous to a venue provision and is, thus, waivable, and there is no inconsistency or conflict among the several circuits or in the Supreme Court of the United States that Petitioner's time for appealing the order compelling arbitration has long since expired and that the Petitioner has lost and waived its right to have the order reviewed. Similarly, there is no inconsistency or conflict among the several circuits or in this court concerning the proper jurisdiction in which to file a motion for an order confirming an arbitration award pursuant to the provisions of Title 9, Section 9, U.S.C. The prior holdings of this court in these specific areas is perfectly clear. The only legal rights of which Petitioner has been deprived are those which Petitioner has voluntarily waived.

Accordingly, it is respectfully submitted that the Petition for Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, be denied in all respects.

Respectfully submitted,

LESLIE A. HYNES
Counsel for Respondents

HYNES & DIAMOND
25 Broadway
New York, N.Y. 10004
Of Counsel

APPENDIX

[4]

[4] MEMORANDUM AND ORDER

Filed: Dec. 18, 1972

United States District Court
Northern District of Ohio, Eastern Division

The Prepakt Concrete Company,
Petitioner

v. CA No. C 72-641

The City of Naples,
Respondent

THOMAS, J.

Petitioner, The Prepakt Concrete Company, moves this court pursuant to 9 U.S.C. § 9 to confirm an arbitration award of $90,372.35 made by the Cleveland Regional Office of the American Arbitration Association on May 17, 1972. Respondent, City of Naples, Florida, objects to confirmation principally alleging that this court lacks jurisdiction to confirm the award and thus the petition should be dismissed. Pursuant to 9 U.S.C. § 10 respondent also moves this court to vacate and set aside the award because the arbitrators deliberately disregarded and misconstrued the applicable law.

Petitioner, an Ohio corporation, and respondent, a municipal corporation existing under the laws of the

State of Florida, entered into a written contract on May 21, 1969, whereby petitioner agreed to repair the timber piling of a municipal pier located in the City of Naples. The contract contained a provision for arbitration which provided:

> 4.35 *Arbitration*
>
> All claims, disputes, and other matters in question arising out of, or relating to, this agreement or the breach thereof * * * shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining. This agreement so to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrator shall be final and judgment may be entered upon it in any court having jurisdiction thereof.

[5] A dispute arose concerning the performance of the work and on May 26, 1970, without filing any notice of demand for arbitration with petitioner, respondent instituted suit against petitioner and its bonding company, American Employers Insurance Co., in the Circuit Court for the 20th Judicial Circuit, Collier County, Florida. That suit alleged a breach of contract by petitioner. On May 28, 1970, petitioner, complying with the arbitration agreement, filed a notice of demand for

arbitration with both respondent and the American Arbitration Association (herein AAA), designating the "hearing locale" as Cleveland, Ohio. On June 2, 1970, respondent notified the AAA of its objections to arbitration of the dispute in Cleveland, Ohio. AAA deferred decision and allowed respondent until November 16, 1970, to file objections.

On June 22, 1970, petitioner and defendant bonding company jointly removed the City of Naples suit to the United States District Court for the Southern District of Florida. Thereafter, respondent moved to remand; petitioner and defendant bonding company moved to stay the trial of the removed action. On October 22, 1970, the federal district court granted the motions to amend the removal petition, to compel arbitration, and to stay the proceedings. It denied the motion to remand.

On October 27, 1970, AAA was advised by petitioner of the federal district court's decision and requested to proceed with arbitration. The arbitrators found that respondent City of Naples breached the contract "as to representation of material facts regarding conditions of the contract work site and subsequent termination of the claimant's contract."

Paragraph 4.35 of the contract provides that disputes shall be decided "in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining." The rules applicable

at that time (effective March 8, 1966) provided in Section 1 that:

> The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration under the Construction Industry Arbitration Rules.

[6] The contract itself does not designate any locale for arbitration. However, by incorporation of the rules into the contract, the parties did agree on a method for determining the place of arbitration.

Section 9 of the Rules provides:

> Parties to an existing dispute may commence an arbitration . . . by filing in any regional office two (2) copies of a written agreement to arbitrate . . . signed by the parties.

Section 10 provides:

> The parties may mutually agree on the locale where the arbitration is to be held. . . . If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale and its decision shall be final and binding.

When petitioner selected Cleveland as the site for arbitration and respondent objected, the latter method

of site selection outlined in Section 10 became applicable. Though respondent objected to the situs of the hearing on three separate occasions, the AAA on December 4, 1970, determined that arbitration should be held in Cleveland, Ohio.

The parties did not specify which court should confirm the award but they did agree that "judgment may be entered upon it in any court having jurisdiction thereof."

Title 9 U.S.C. §9 provides, in part,

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award . . . and shall specify the court, then . . . any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified or corrected . . . . If no court is specified in the agreement . . . then such application may be made to the United States court in and for the district within which such award was made.

Since the award was made in this district (Cleveland) and the agreement provided that any court having jurisdiction of the award may confirm it, then petitioner, under the terms of both the agreement and

the statute, must seek confirmation of the award in this court. Unless this court otherwise lacks jurisdiction, the award must be confirmed. 9 U.S.C. § 9.

[7] Relying on 9 U.S.C. § 4, respondent contends that this court lacks jurisdiction to confirm the award because arbitration should have been held within the district of the United States District Court for the Southern District of Florida; and that district court erred in ordering the parties to arbitrate in Cleveland, Ohio. Respondent further contends that because the district court granted a stay, its jurisdiction still exists and, therefore, the petition for confirmation should have been filed there.

Respondent maintains further that this court lacks jurisdiction to confirm the arbitration award because, in its view, 9 U.S.C. § 9 does not contemplate confirmation of an award in a federal district court which is not the same court that ordered arbitration under 9 U.S.C. § 4.

9 U.S.C. § 4 provides in part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States District Court which, save for such agreement, would have jurisdiction under Title 28 . . . of the subject matter of a suit arising out of the controversy between

> the parties, for an ordering directing that such arbitration proceed. . . . The hearing and proceedings, under such an agreement, shall be within the district in which the petition for an order directing such arbitration is filed.

The district court found jurisdiction under Title 28 and its ruling will be accepted here. Notably, respondent admits in its answer that the district court had jurisdiction.

Before proceedings in the state court were instituted, either party to the contract could have moved in any district court for an order compelling arbitration. The statute clearly provides for it. No situs for arbitration having been designated in the contract a choice of forum to compel arbitration was solely dependent upon the parties' choice of a hearing situs. Possibly because it believed that arbitration was unavailable as a remedy respondent instituted suit in the state court.

Acting jointly with the bonding company petitioner voluntarily removed the City of Naples breach of contract action to the federal district court. Instead of filing an application under 9 U.S.C. § 3 for a stay order only (see *Shanferoke Coal & Supply Co. v. Westchester Service Corp.*, [8] 293 U.S. 449 (1935)) petitioner sought to further invoke the power of that federal district court by moving for an order to compel arbitration. Under 9 U.S.C. §4 that United States district court had the power to order arbitration. Under

a further provision of Section 4, "the hearing and proceedings . . . shall be within the district in which the petition for an order directing such arbitration is filed." Thus, the district court could have compelled the petitioner, having filed its motion for an order compelling arbitration, to submit to arbitration proceedings within the Southern District of Florida.

The district court's order did not specify Cleveland, Ohio as the situs of the arbitration, but it may be assumed from the record that this was its intent.[1] But it probably could not have forced arbitration beyond its district. See *Zenol, Inc. v. Carblox, Ltd.*, 334 F.Supp. 866, 870 (W.D. Pa. 1971). Nevertheless the fifth sentence of Section 4, just quoted, is a venue provision. See *Farr & Co. v. Cia. Intercontinental De Navegacion De Cuba*, 243 F.2d 342, 346 (2 Cir. 1957). Hence, the court's order to conduct the arbitration proceedings in Cleveland was not jurisdictionally defective. Because it acquired jurisdiction over the subject matter and over the parties its order and the subsequent arbitration proceedings are not null, void and of no effect.

---

[1]The removal petition recites: "This petition for removal is made without prejudice to the right of petitioner . . . to arbitrate and complete such arbitration in a proceeding now pending in accordance with the agreement of the parties and the rules of the American Arbitration Association."
The arbitration proceedings had already been pending approximately 25 days before the removal petition was filed and approximately five months before the court entered its order compelling arbitration. Therefore, it must be concluded that the federal district court in Florida knew of the arbitration proceedings then pending. Moreover, attached to the motion was a letter from the Cleveland Regional Office of the AAA acknowledging respondent's hearing locale objections.

By fixing the hearing locale outside its district, the district court imposed an improper venue. Nevertheless, respondent may not successfully urge that error as a reason for denying confirmation of the award, because it has waived that objection. At the time the motion to compel arbitration was pending respondent could have challenged the court's [9] authority to order arbitration in Cleveland, Ohio. Respondent knew that the situs of the pending arbitration was outside the district of the court. Yet the record does not reveal, nor does respondent here contend, that it brought this venue problem to the court's attention at that time. Thus, it cannot now take advantage of an error which it could have easily avoided by timely making its venue objection in that court. Its inaction contributed to the error. Moreover, after the court ordered arbitration in Cleveland and after respondent made its motions for stay and remand, but prior to the court's November 30th order, respondent never suggested to the district court that it lacked the power to compel arbitration outside its own district. Significantly, at that time (November 30), respondent knew that the AAA had already determined the proper hearing locale to be Cleveland, Ohio. Yet it still did not urge as error that the court's order contravened 9 U.S.C. § 4.

On three separate occasions respondent objected to the AAA that the hearing locale was improper, but it never objected on the ground that the court's order contravened 9 U.S.C. § 4. Under the terms of its agreement determination of the hearing locale by the

AAA is "final and binding" on the parties. Thus, not having suggested to the arbitrators that the district court's order was erroneous it must be deemed to have waived that objection also, even though it did object on other grounds at the time of the hearing. Subject matter jurisdiction was properly vested in the AAA and because of respondent's waiver of the venue objection its decision is also binding on this court. Certainly, respondent cannot contend that it was willing to arbitrate in Florida but for the court's order. Respondent had an equal opportunity to request arbitration and to choose a hearing locale. Instead, it filed suit ignoring its contractual obligation to arbitrate. Hence, respondent cannot claim prejudice upon the ground that arbitration was held in Cleveland, Ohio.

[10] Other reasons underpin a finding that this court should confirm the award. Had respondent considered the order void, prompt review was available. The grant of a stay pending arbitration is analogous to the granting of an injunction, and appellate jurisdiction exists under 28 U.S.C. § 1292(a)(1). *Southeastern Enameling Corp. v. General Bronze Corp.*, 434 F.2d 330, 332 (5 Cir. 1970). See also, *Jackson Brewing Co. v. Clarke*, 303 F.2d 844, 845 (5 Cir. 1962). Thus respondent could have immediately brought the error to the attention of the Fifth Circuit and thereby avoided any possibility of the attendant expense, delay, and inconvenience which accompany the relief it now seeks. The procedure employed by respondent is contrary to the

[10] *Memorandum and Order*

very purpose and intent of arbitration; and the consequences may be irreparable.

Moreover, its time for appeal having long since expired (Rule 73, Federal Rules of Civil Procedure) respondent's contention that should this court confirm the award it would create two appealable decisions from two different courts, loses its persuasive effect. If confirmation of the award creates two appealable decisions from two different courts (because the bonding company was not a party to the arbitration and is a defendant in the stayed action), such result obtains primarily because of respondent's failure to appeal the order that compelled arbitration outside the district. For all practical purposes this order terminated the lawsuit in that court. Compare *Chatham Shipping Co. v. Fertex Steamship Corp.*, 352 F.2d 291, 294 (2 Cir. 1965).

Furthermore, 9 U.S.C. § 9 provides that when no confirming court is specified in the agreement "application may be made to the United States court in and for the district within which such award was made." That [11] clause is likewise a venue provision. Unless waived it must be complied with. Thus, petitioner is correct when it states that "by reason of the fact that the arbitration award was entered in Cleveland, Ohio Prepakt had no alternative but to seek confirmation of that award in this court."

This court recognizes, as respondent contends, that in the absence of an agreement specifying a particular

court, Section 9 does not contemplate confirmation of an award in a district court which is not the same court that ordered arbitration. Sections 4 and 9 of Title 9 are complementary. Absent a hearing locale and confirmation forum designation, the court ordering arbitration will be the one confirming the award. However, where the parties arbitrate outside the district of the court that ordered arbitration and no objection is made on that ground either to the court ordering arbitration or to the arbitrators and no appeal is taken from the orders staying the proceedings and compelling arbitration, then the court whose district encompasses the hearing locale is the proper court to confirm the award. It might also be noted that were this court to order petitioner to seek confirmation in Florida, its order would contravene the express language of 9 U.S.C. §9. Thus, whether or not sections 4 and 9 contemplate confirmation of the award in the district court in Florida, because jurisdiction and venue exist in this court, and because the agreement provides for confirmation in any court having jurisdiction, the award must be confirmed here.

Respondent's representations as to the proceedings that will follow if the award is not confirmed are not clear. However, inferring from the fact that respondent requests this court to set aside the award it can reasonably be concluded that respondent envisages that arbitration proceed again within the Southern District of Florida. Such an order would defeat the pri-

mary purpose of arbitration which is the speedy resolution of disputes. To permit that result would involve a further delay in the resolution of this dispute, added unanticipated expense to the parties, a rehearing before an arbitration panel, another proceeding to confirm the award, [12] and any appeals which may thereafter be taken. Though the court is reluctant to decide this case on the basis of a known waiver of a substantial right (both the appeal and the venue objections), when balanced against the alternative and considered with respondent's lack of diligence, this court can only conclude that the award must be confirmed.

Finally, the cases cited by respondent do not adequately support its position. In *China Union Lines v. Steamship Co. of 1949*, 136 F.Supp. 597 (S.D. N.Y. 1955), libelant moved in a Texas district court to attach respondent's funds and for an order directing arbitration. The court ordered arbitration according to the contract (in New York) but expressly retained jurisdiction to confirm the award. In an action to stay arbitration in the Southern District of New York, the court acknowledged that "the only district within which the arbitration could proceed by force of a petition and court order would be the Southern District of Texas," and that the Texas court's order "contravened the provision contained in the statute [9 U.S.C. § 4]." *China Union Lines, supra* 599. Though the stay was granted the case was not decided on that ground. The *ratio decidendi* was that libelant waived its right to seek arbitration

because of the extent of its activity in the New York court seeking judgment without arbitration.

In *Lesser Towers, Inc. v. Roscoe-Ajax Construction Co.*, 285 F.Supp. 1005 (S.D. Calif. 1966), the central issue was whether a motion to confirm an award brought in a state court and subsequently removed was a separate proceeding from a petition to compel arbitration brought in the same state court and thus was an initial pleading within the 30-day rule for removal. Finding that the motion to confirm the award was not a separate proceeding, the court remanded the case to the state court. Because of that finding the court opined that its authority under Section 9 did not extend to situations in which jurisdiction was in a state court "by virtue of that court having considered and ruled upon initial judicial proceedings in the matter," and where the contract provided for confirmation in the court "having jurisdiction." *Id.* at 1110. The court's opinion seems prompted more by a consideration of federal-state relations that a construction of [13] Section 9. In any event, no question of waiver was presented.

The other cases cited by respondent for the proposition that this court does not have jurisdiction to confirm the award are not helpful. However, one case that it heavily relies on actually supports this court's ruling that the award should be confirmed in the district court where it was made. See *Arthur Imerman*

Undergarment Corp. v. Local 162, 145 F.Supp. 14, 17 (D. N.J. 1956). Compare also *Reed & Martin, Inc. v. Westinghouse Elec. Co.*, 439 F.2d 1268, 1276 (2 Cir. 1971).

Continental Grain Co. v. Dant & Russell, Inc., 118 F.2d 967 (9 Cir. 1949) clearly holds that one who moves for an order compelling arbitration (9 U.S.C. § 4) in a court not within the district where arbitration is to take place, cannot later complain that the court proceeded in accordance with the applicant's request and the statute. This court agrees with such construction, especially on the facts in that case. However, the significant difference between the two cases is that there, arbitration had not then taken place and libelant did not move for an order confirming the award. The facts did not present a question of improper venue or waiver. In the instant case, however, arbitration has been concluded and, because of its failure to object on the ground of improper venue, at the time the district court ordered arbitration or appeal therefrom, respondent waived its right to object to improper venue at the time of confirmation.

Because the issue of this court's jurisdiction to hear and determine petitioner's motion to confirm the arbitration award is deemed separate from respondent's claim that the arbitrators deliberately disregarded the applicable law, this court has first decided the threshold issue. Before considering the arbitration record to determine whether any ground exists for vacating

the award under 9 U.S.C. § 10, the court is filing this memorandum setting forth its findings and conclusions on the jurisdictional issue.

The parties are requested to provide the court with a single copy of the arbitration record, including exhibits.

IT IS SO ORDERED.

/s/ WILLIAM K. THOMAS
United States District Judge